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Docket Management Facility (USCG-2001-8773) - 36
U.S. Department of Transportation, Room PL-401
400 Seventh Street SW
Washington, DC 20590-0001

RE: [USCG-2001-8773] RIN 2115-AG07
Notice of Proposed Rulemaking

To whom it may concern:

My name is Ronald A. Rutherford. I am President of InTeliSource, Inc., and have been providing drug and alcohol testing services to inland marine employers since 1991. InTeliSource, Inc. provides third party administration, collection of drug testing specimens and conducts evidential breath alcohol testing. InTeliSource, Inc. also consults with clients regarding the regulations governing drug and alcohol testing and advises them on issues of compliance therewith.

Please keep in mind my thoughts and comments are relative to "brown water" and more specifically, inland marine operations. I realize the desire to have a "one size fits all" solution to the problem but there are significant differences between "blue water" operations and inland marine operations. Sometimes what seems like the best or only solution for "blue water" creates a significant, if not nearly impossible, burden for "brown water" employers.

I oppose the changes being proposed in its current form. As currently proposed, many issues are not adequately addressed, solutions are incomplete and many pitfalls exist which very likely would impact employers adversely. However, I do not object to the intent of the proposed change.

"This rule would provide that alcohol testing requirements after an SMI will not prevent personnel who are required to be tested for alcohol from performing duties in the aftermath of an SMI when their performance is necessary to meet safety concerns directly related to the casualty." Pardon my directness but this is absurd. If someone is required to undergo alcohol testing as a result of involvement in an SMI and alcohol has not been eliminated as a possible contributory cause of the SMI, that individual should not perform any safety sensitive duties until that determination has been made. To allow them to do so would potentially expose the employer to further

liability.

"For alcohol testing conducted aboard vessels, we would allow vessel owners and operators to choose <u>any</u> breath- or saliva-alcohol device that can determine the presence of alcohol in a individual's system." "The provisions in 49 CFR part 40 that relate to alcohol testing, including use of the DOT Alcohol Testing Form, however, do not apply to Coast Guard required testing." I strongly object to **ANY** deviation from 49 CFR part 40 as it applies to other agencies. To do so subjects the employer to further exposure to liability. You have no requirement for testing at any particular breath alcohol level and have not established a level not to be exceeded. An unreliable device could be used or a device that has not been stored properly. ASD's currently used test at a level of $\geq$ .02%. 49 CFR part 40 does not consider an employee to be in violation unless their alcohol level is $\geq$ .04%. Training requirements for individuals conducting the tests have not been established and company employees who work closely with the individuals being tested would perform the testing. Furthermore, you have not required a confirmation test of initial positives. I would not want to see an employer try to defend himself or herself against an employment action brought as a result of a positive result obtained under these circumstances. They would have no defense.

Requiring training to perform the testing aboard the vessels would require the employer to always have at least two trained personnel on each vessel at all times. I believe the training and staffing to be a hardship to the employer.

Sec. 4.06-1(d) As stated above, I believe anyone determined to be involved in an SMI should be relieved of duty until it has been determined consumption of alcohol is not a factor.

Sec 4.06-20 (3) This states the sample **"must be taken only by personnel trained to operate the alcohol-testing device."** You have not defined the required training. To have any training procedures that could not reasonably be defended in a court of law would further expose the employer to liability in the event some action was taken as a result of an individual's test indicating the presence of alcohol. I feel the employer is being required to expose the company to liability by having another employee conduct the testing in the first place, much less an employee the Court determines later to have had insufficient training in the use of the device.

SUMMARY

I recognize and appreciate the need to conduct alcohol testing as soon as possible. However, to do so without establishing defensible guidelines and training serves the interest of no one. To establish a two-hour requirement to accomplish the testing puts a significant burden on an inland marine employer. Most of the time it would take longer than two hours for an individual requiring alcohol testing to be removed from the vessel and transported to a facility to be tested. Additionally, it would normally take longer than two hours to get someone to the vessel to conduct the testing unless law enforcement or emergency medical personnel were summoned. To allow another employee to conduct the alcohol testing solves the two-hour requirement but further exposes the employer to liability and the reliability of the testing is not assured.

If the Coast Guard intends to implement a regulation to address this issue, my first preference would be that the Coast Guard adopts the guidelines established in 49 CFR part 40. Approved testing devices and required training of personnel using the devices is already established. Documentation and confirmation testing is also addressed. By following 49 CFR part 40, the employer is not exposed to further liability as a result of conducting the testing with inferior or possibly defective devices or inadequately trained employees. The two-hour rule would still be a hurdle.

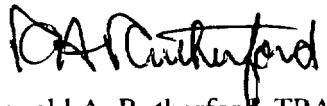
If the vessels are to be required to carry testing devices on board, the devices should only screen for alcohol levels at or above the levels determined to impair an individual. To screen for a lesser value would serve no purpose. And still, to not require confirmation testing by an accepted and approved device operated by a person trained and certified to operate the device would make the screening results useless in any kind of enforcement action or a court of law. Having a certified BAT and an approved EBT on every "brown water" vessel would be prohibitive for nearly all employers.

Per existing regulations, all supervisors aboard the vessels have received supervisory training including the effects and consequences of drug and alcohol use on personal health, safety and work environment; and, the manifestations and behavior cues that may indicate drug and alcohol use and abuse. There are always at least two supervisors, and usually more, aboard the vessels most likely impacted by this proposed change. Could these trained individuals be used in some capacity to conduct an initial assessment of the individuals involved in an SMI to assess the likelihood that alcohol is a contributing factor? If this could be done, possibly a bit more time to actually conduct the alcohol screen would be permitted. This would make it more likely a certified BAT or STT using an approved device or a medical facility would be conducting the testing rather than a non-certified employee and co-worker conducting the testing.

Perhaps the best solution to the whole problem would be to require the Coast Guard to respond to all SMI's within the two-hour time period and to be responsible for conducting the alcohol screening. If I recall correctly, it was the original intent of the regulations to have the Coast Guard perform this testing.

I wish there were an easy solution that worked for everybody. Unfortunately, I don't believe there is one but this should not stop anyone from at least coming up with a solution that does not overly burden or create additional liability for any employer.

Very truly yours,



Ronald A. Rutherford, TPA, CPCT, BAT